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May 9, 2000

VIA COURIER

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-A325
Washington, DC 20054

Re: *Ex Parte* Presentation in Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-carrier Compensation for ISP-Bound Traffic (CC Docket No. 99-68)

Dear Ms. Salas:

Pursuant to 47 C.F.R. § 1.1206(b), this letter is to inform you that an *ex parte* presentation was made yesterday regarding issues in the above-referenced proceeding. The following members of the Common Carrier Bureau's Competitive Pricing Division were present: Jane Jackson, Chief; Tamara Preiss, Deputy Chief; and Rodney McDonald. They met with Jonathan Jacob Nadler of Squire, Sanders & Dempsey, LLP, representing the Information Technology Association of America (ITAA) and Mark Uncapher, Vice President of Information Services and Electronic Commerce Division of ITAA. The issues addressed in this meeting are outlined fully in the attached written *ex parte* presentation, which was provided during the meetings.

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In accordance with Section 1.1206, an original and two copies of this letter and attachment are being submitted to the Secretary's office on this date. Please address any questions regarding this matter to the undersigned.

Sincerely,

Jonathan Jacob Nadler
Counsel for Information Technology
Association of America

Enclosure

cc: Jane Jackson, Chief, Competitive Pricing Division, Common Carrier Bureau
Tamara Preiss, Deputy Chief, Competitive Pricing Division, Common Carrier Bureau
Rodney McDonald, Competitive Pricing Division, Common Carrier Bureau
Mark Uncapher, Information Services and Electronic Commerce Division of ITAA

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THE COMMISSION SHOULD ADOPT A "UNIFIED THEORY" GOVERNING THE REGULATORY TREATMENT OF ISP-BOUND TRAFFIC

Submission of the Information Technology Association of America

May 8, 2000

- **Goals of the Proposed "Unified Theory"**

  -- Preserve FCC jurisdiction over physically local ISP-bound traffic; including preemption authority

  -- Preserve the ability of ISPs to purchase State-tariffed business lines

  -- Preserve exiting CLEC reciprocal compensation agreements governing ISP-bound traffic

  -- Place ISP-bound traffic within the telephone exchange/exchange access/information access trichotomy established in the Telecommunications Act of 1996 in a manner the gives the FCC maximum regulatory flexibility

- **Suggested Approach**

  -- Declare that ISP-bound physically local traffic is jursidictionally mixed and inseverible and, therefore, subject to plenary FCC regulation

  -- In the absence of Federal rules, allow the States to continue to regulate certain critical issues related to ISPs-bound traffic

    * Prices paid by ISPs for physically local connections

    * Payment of reciprocal compensation for ISP-bound traffic

  -- Require States to treat ISPs like other business end-users that connect jursidictionally mixed private line networks to the local network

  -- Classify ISP-bound traffic as "information access" traffic

- **ISP-bound Physically Local Traffic is Jurisdictional Mixed and Inseverible and, Therefore, Subject to Plenary FCC Regulation**

  -- This approach is technologically correct

    * The circuit switched model – a single communication, over a dedicated transmission path, between two specified points – is inapplicable to packet networks

    * In many cases, a single on line-session can be both inter-state and intra-state as the end-user interacts with multiple servers

    * Indeed, in some cases the session may be inter-state and intra-state at the same moment (mass email)

    * Clearly, however, a significant portion of on-line sessions involve inter-action with intra-state data (caching; downloading)

    * Neither the end-user, nor the LEC, nor the ISP knows or cares about the jurisdictional nature of the session

  -- This approach has been upheld by the courts

    * In the *Access Charge Appeal,* the Eighth Circuit cited with approval the FCC's "finding" that ISP-bound traffic is jurisdictionally mixed and inseverable, *See Southwestern Bell v. FCC,* 153 F.3d 523, 543 (8th Cir. 1998) ("[T]he FCC has determined that the [local telecommunications] facilities used by ISPs are 'juris-dictionally mixed,' carrying both interstate and intrastate traffic. . . . [T]he FCC cannot reliably separate the two components involved in completing a particular call, or even determine what percentage of overall traffic is interstate or intrastate . . . .")

    * In *California I,* 905 F.2d 1217 (9th Cir. 1990) (enhanced services preemption) *California II,* 4 F.3d 1515 (9th Cir. 1992) (Federal tariffing of local ONA services used by ESPs) and *California III,* 39 F.3d 919 (9th Cir. 1994) (limited enhanced services preemption), the Ninth Circuit affirmatively required the FCC to account for the fact that enhanced service traffic is jurisdictionally mixed

  -- While consistent with the FCC's historic practice, as well as judicial precedent, this approach would require some modification of statement, in the *Reciprocal Compensation Order*, that ISP-bound traffic is "substantially interstate"

- **In the Absence of Federal Rules, Allow the States to Continue to Regulate ISPs-bound Traffic**

-- The FCC should continue to allow the States to establishes prices paid by ISPs for local connections and the obligation of ILECs to compensate CLECs for carrying ISP-bound traffic

-- There is ample precedent for the FCC to "share" authority over jurisdictionally mixed, inseverible services

* In the *Access Charge Appeal,* the Eighth Circuit found that, given the jurisdictional nature of ISP-bound traffic "the Commission has appropriately exercised its discretion to require an ISP to pay intrastate charges for its line and to pay the [Federal] subscriber line charge"

* The FCC frequently has deferred to the States regarding regulation of jurisdictionally mixed services. *See Illinois Bell Telephone v. FCC,* 883 F.2d 104 (D.C. Cir. 1989) (Centrex); *MTS and WATS Market Structure,* 4 FCC Rcd 5660 (1989) (mixed-use private lines); *Filing and Review of Open Network Architecture Plans,* 4 FCC Rcd 1 (1988) (vertical services)

- **Require States to Treat ISPs Like Other Business End-users That Connect Jursidictionally Mixed Private Line Networks to the Local Network**

-- To the extent that the FCC allows the States to share regulatory authority, it should require the States to comply with the following basic principle: ISPs are business end-users who attach mixed-use private line networks to the local networks; a State may not discriminate between ISPs and other business users

* States must allow ISPs to purchase local network connections out of the same local tariffs as other business end-users

* In any arbitration, a State must apply the same rule governing reciprocal compensation to ISP-bound traffic as to other traffic bound for business end-users

-- The FCC has authority to prevent States from discriminating against inter-state traffic. *See, e.g., New York Telephone v. FCC,* 631 F.2d 1059 (2d Cir. 1980) (FCC can bar State tariffs that discriminate against customers that connect local facilities to interstate private networks)

- **Classify ISP-bound Traffic as "Information Access" Traffic**

-- As the D.C. Circuit recognized in the *Reciprocal Compensation Appeal,* ISP-bound traffic does not fit clearly within the definition of either "telephone exchange" or "exchange access" service

  * Transporting ISP-bound traffic plainly is not the provision of a service for the "origination or termination of telephone toll service"

  * Classifying ISP-bound traffic as telephone exchange traffic would be inconsistent with the *GTE DSL Order*, 13FCC Rcd 22466 (1998), and numerous prior orders, which have consistently viewed such traffic as a form of access traffic; such a classification also could limit FCC authority

-- "Information access" is a distinct regulatory category

  * The concept originated in the MFJ; the Decree Court expressly analogized it to the access service used by IXCs, *United States v. AT&T*, 552 F.2d 131, 196 n.268.

  * The Telecommunications Act of 1996 expressly preserves the "information access" classification, 47 U.S.C. § 251(g)

  * The FCC recognized the existence of information access as a distinct service in the *Non-accounting Safeguards Order,* 11 FCC Rcd 21905, 22024 n.621 (1998)

-- Classifying ISP-bound traffic as "information access" traffic would give the Commission significant flexibility

  * This category is a "blank slate"

  * The Commission could preserve all prior holdings viewing the transport of ISP-bound as an interstate "access service" within the Commission's jurisdiction

  * Future decisions regarding ISP-bound traffic would not become entangled in unrelated issues

-- Classifying ISP-bound traffic as "information access" would have no adverse effects on the Commission's authority or the ILECs' obligations

  * ILECs that provide information access service are subject to regulation as an ILEC; the Section 251(h) definition of an ILEC is content-neutral; and Section 706 plainly assumes that the regime applicable to ILEC-provided voice services applies to ILEC-provided, data-oriented "advanced telecommunications services," such as those used by ISPs

  * Most of the pro-competitive obligations adopted in the Telecommunications Act apply to any ILECs-provide "telecommunications service," regardless of classification

+ Duty to provide UNEs (Section 251 (c)(3))

+ Duty to provide physical collocation (Section 251(c)(6))

+ Duty to negotiate in good faith (Section 251(c)(1))

+ Duty to disclose network information (Section 251(c)(5))

* The *only* provision of Section 251 that is limited to providers of "telephone exchange" or "exchange access" service is Section 251(c)(3), which requires ILECs to interconnect with providers of these services; the Commission, however, has authority under Section 201 and 251(a)(1) to order ILECs to interconnect on just, reasonable, and non-discriminatory terms with carriers that offer "information access" service

-- This approach would require the Commission to revise the position that it took in the *Advanced Services Remand Order* in the *Reciprocal Compensation Appeal*, where the agency stated that "local exchange" and exchange access" constitute the "universe" of LEC-provided physically local services